DEATH OF THE DRAWER OF A CHECK.

RECENT decisions upon the effect of the death of the drawer of an unaccepted check render a new consideration of the subject timely. The discussions of this question both in the text-books and in the reviews have not been accompanied by a full citation of the authorities.[1]

Ever since the case of Lawson *v.* Lawson[2] was decided in 1718, the practice among bankers seems to have been unquestioned. A banker after he has heard of a depositor's death will not accept or pay a check of that depositor. The case of Lawson *v.* Lawson was decided in the infancy of banking in England. English banking was of a purely indigenous growth; it had no connection with the older European banks. In the latter part of the seventeenth century there grew up among commercial houses, merchants, and landowners, the practice of depositing their cash with goldsmiths, in whose hands was the business of changing and equalizing money. These deposits were drawn upon by orders upon the goldsmiths, and the orders became used as a medium of payment as early as 1677.[3] Such was the origin of our modern bank checks.

At that time the existing law rendered it certain that these orders would be treated practically as demand bills, and that the relation between the goldsmith and his depositor would be one of debtor and creditor. As early as 1598 a deposit of money to be redelivered upon request had been held to create a debt, and that the proper action for the recovery of such a deposit was not detinue or account.[4] The wisdom of this old ruling has been confirmed in the history of banking.

---

[1] See 3 Va. L. J. 323 and 14 HARV. L. REV. 588.

[2] 1 P. Wms. 441.

[3] See 8 Macaulay's England 327.

[4] Britton *v.* Barnett, Owen 86 (1598). The whole report is as follows: "A man delivers money to J. S. to be redelivered to him when he should be required: which J. S. refused and therefore an action of debt was brought and the defendant demurred for that an action of debt would not lie but an account.

"Walmesley: An action of debt will very well lie. And he took a difference between goods and money; for if a horse be delivered to be redelivered, there the property is not altered, and therefore a Detinue lies, for they are goods known: but if money be delivered, it can not be known and the property is altered and therefore a debt will lie.

"Owen and Glanville agreed to this."

It is apparent that the orders upon goldsmiths would be treated by the courts as bills of exchange, and that much of the existing law as to bills would be applied to checks. It has sometimes been inaccurately said by courts and text-writers that checks differ from bills of exchange in that they need no presentment for acceptance and are not entitled to days of grace. But this is an error. Demand bills, of which checks are a species, were never entitled to days of grace and never required presentment for acceptance.[1]

But firmly as it has been settled that the relation between a banker and his depositor is that of debtor and creditor, and that a depositor draws demand bills upon his debtor, the minds of laymen generally have never fully comprehended the situation. In common speech we hear it continually said that a man has money at his banker's. Courts sometimes use this language, and ready money or cash in hand bequeathed by a will has been held to include a general deposit with a banker.[2]

One of the curious manifestations of this idea is shown by those decisions which call a check an assignment *pro tanto* of the deposit. Four states[3] in the Union hold this theory, and certain text-writers have supported it. But everywhere else a check is like a bill of exchange drawn generally (and if it be not so drawn it is not a bill); it is not an assignment of any fund in whole or in part.[4]

The assignment theory of a check has produced the only uncertainty which has ever existed as to what is the effect of the death of the drawer of an unaccepted but delivered check,[5] wher-

[1] 2 Ames, Cases on Bills 265, *n.* 4; id. 133, 134, *n.* 1 and 2; Philpott *v.* Bryan, 3 C. & P. 244. In the early cases checks are treated as bills. In Ward *v.* Evans, 2 Salk. 442 (1702), the reporter speaks of an order on a goldsmith as a "note," and a few lines later calls it a "bill." In Thorold *v.* Smith, 11 Mod. 71, 87 (1706), four years later, Lord Holt calls an order upon a banker "a note" and "a bill." There is no indication in the reports whether these orders mentioned were accepted or unaccepted. The only differences that now exist between demand bills and checks is that a demand bill is expected to be put into circulation, while a check is not; and if a demand bill is not presented for payment within a time which the law deems reasonable, the drawer is released, while in the case of a check the drawer is released only to the extent of his injury.

[2] Fryer *v.* Rankin, 11 Sim. 55; Stern *v.* Richardson, 37 L. J. Ch. 369; Varsey *v.* Reynolds, 5 Russ. 12; Langdale *v.* Whitfield, 27 L. J. Ch. 795.

[3] Illinois, Kentucky, South Carolina, Nebraska.

[4] Mandeville *v.* Welch, 5 Wheat. 286; National Bank of Republic *v.* Millard, 10 Wall. 152; First National Bank *v.* Whitman, 94 U. S. 343; Florence Mining Co. *v.* Brown, 124 U. S. 385; Shand *v.* DuBuisson, L. R. 18 Eq. 283; Hopkinson *v.* Forster, L. R. 19 Eq. 74.

[5] In 14 HARV. L. REV. 588, it is contended that a check is an order, not an authority, and hence ought not to be revoked by the drawer's death.

ever the subject is not regulated by statute.[1] A check undelivered before the drawer's death can confer no rights upon any one.[2]

The authorities strictly in point upon the general question are not numerous, but there is an abundance of *dicta*. The text-writers, with one exception, have laid down the rule that the death of the drawer of such a check revokes the authority given by the check to the banker; but text-writers do not establish the law. We must look to the decisions.

The effect of the death of the drawer must be considered, 1st, as between the drawer's estate and the payee or holder; 2d, as between the bank and the holder; 3d, as between the bank and the drawer's estate.

I. As between the drawer's estate and the payee of a check dishonored because of the drawer's death, the general rule as to bills of exchange governs. If the payee has given a consideration, the estate is liable;[3] if he is a volunteer, the estate is not liable.[4] A *bona fide* transferee can, of course, recover on the check against the drawer's personal representative, while as to a holder not *bona fide*, the defenses between drawer and payee are open.

II. As between the holder and the bank, it is apparent that if the bank refuses to pay the check, the holder must have recourse upon the drawer's estate, since, even when no question of the drawer's death arises, the rule of law is absolute that the holder of an unaccepted check has no remedy against the banker, just as the holder of a bill of exchange has no remedy against the drawee until the drawee has accepted the bill. It is immaterial under this rule whether the holder be the payee or a *bona fide* transferee.

There are, however, four states, mentioned above, which have held the assignment theory of a check, and in which the bank in the ordinary case can be compelled to pay the check. The Supreme Court of one of those States, however, receding from its assignment theory, has lately held that the banker with notice of the death not only is not compelled to pay the check, but if he

---

[1] Massachusetts has a statute. England has a statute declaratory of the common law. The Negotiable Instruments Law seems to be silent on the matter.

[2] Drum *v.* Benton, 13 App. Cas. D. C. 245.

[3] Whitehead *v.* Whitehead, 90 Me. 468, can be supported upon this ground. It cannot be supported on the grounds stated by the court. Rolls *v.* Pearce, L. R. 5 Ch. D. 730, can be supported on this ground, but not on the ground stated by the Vice-Chancellor.

[4] All the English cases cited *post* establish this proposition, except Bromley *v.* Brinton, L. R. 6 Eq. 275, which will be noticed *post*.

does pay, he must refund the amount paid to the drawer's estate.[1] It is doubtful what the Supreme Court of Illinois, Nebraska, and South Carolina will hold.[2] An intermediate court in Missouri[3] decided, on the assignment theory of a check, that the unaccepted check was not revoked by the drawer's death, even though the bank had notice of the death. But that case is no longer an authority.[4]

Although the bank may refuse to pay the unaccepted check on account of the drawer's death, except possibly in the states mentioned above, yet it may happen that the bank has accepted the check with notice. If it does so, it would seem that it would be held, since it could not rescind its acceptance on any ground except that of a mistake of law. Acceptance granted to the holder is payment and releases the drawer. The bank, however, which pays the check, ought in justice to be subrogated to the claim of the payee against the drawer's estate.

III. Coming to the rule that applies as between the banker and the drawer's estate, it will be necessary to review the decisions and the *dicta* which have a bearing on the question.

The original *dictum* is in Lawson *v.* Lawson.[5] In that case it was held by Sir Joseph Jekyll, as between the executor and the donee of a check, that a bill upon a goldsmith given by a man upon his deathbed to his wife for the purpose of buying mourning would operate as an appointment.[6] During the course of the argument Sir Joseph Jekyll remarked that the testator's order on the goldsmith was but an authority, and that it was de-

---

[1] Weiand's Adm'r *v.* State National Bank, 65 S. W. Rep. 617 (Ky.).

[2] In Illinois it was held, in Union National Bank *v.* Oceana National Bank, 80 Ill. 212, that as to a *bona fide* holder the check could not be countermanded, but the bank must pay. Evidence of a "defense between drawer and drawee was rejected." The court here means payee. (In Bank of Antigo *v.* Union Trust Co., 149 Ill. 343, the court uses the word "drawee" for "payee.") In Niblack *v.* Park National Bank, 169 Ill. 517, the court held that a payee who took a check for a debt was a *bona fide* holder. In Gage Hotel Co. *v.* Union National Bank, 171 Ill. 531, it was held that as against an actual *bona fide* holder, as the law defines the term, a check could not be revoked, and thus in Illinois a banker must ascertain this fact at his peril. For the curious conflict in Illinois cases on checks, see Zane on Banks 228, *n.* 26, 229, *n.* 2, 233, *n.* 22, 250, *n.* 30, 586, *n.* 13.

[3] Lewis *v.* International Bank, 13 Mo. App. 202.

[4] See Dickinson *v.* Coates, 79 Mo. 250; Coates *v.* Doran, 83 Mo. 337, which reject the assignment theory of checks.

[5] 1 P. Wms. 441. The case is not authority. See Ward *v.* Turner, 2 Ves. sr. 431.

[6] In the ecclesiastical courts such checks have been held to be codicillary. Bartholomew *v.* Henley, 3 Phillimore 317; Gladstone *v.* Tempest, 2 Curteis 650; Jones *v.* Nickolay, 3 Rob. Ecc. 288.

termined by the testator's death. This theory of a check has been adhered to by the courts. The report of the case is exceedingly unsatisfactory, but Lord Loughborough, in Tate *v.* Hilbert,[1] says that the report of Lawson *v.* Lawson is certainly inaccurate, that the bill was payable ten days after sight,[2] and stated upon its face that it was for mourning. What Sir Joseph Jekyll actually did was, in a chancery court, to admit the check to probate as part of the will, although as to that matter the ecclesiastical court had exclusive jurisdiction.[3]

In Tate *v.* Hilbert[4] a testator had made a gift to Tate of a check made payable to "self or bearer" which was unaccepted at the date of the drawer's death. The bank refused payment on account of the death, and a bill in equity was brought by Tate against the drawer's executor. Lord Loughborough seems to approve of Sir Joseph Jekyll's statement as to the determination of the authority of the check, and refused to hold the check to be an appointment.

In Hewitt *v.* Kaye,[5] which was another case of a gift, Lord Romilly said: "But a cheque is nothing more than an order to obtain a certain sum of money, and it makes no difference whether the money is at the banker's or anywhere else. It is an order to deliver the money, and if the order is not acted on in the lifetime of the person who gives it, it is worth nothing." This statement was hardly necessary to the decision, for the facts of the case show an ordinary bank check unaccepted at the death of the drawer, and a suit in equity brought against the executor by the payee of the check. The check being without consideration and the suit being between the payee and the drawer's representative, it was governed by the ordinary rule; but it was claimed that the check had actually transferred the equitable title to a part of the bank deposit.

In Bromley *v.* Brunton,[6] Sir John Stuart, V. C., held, on a similar state of facts, except that the check had been presented but payment refused on account of a doubt as to the signature, that the

---

[1] 2 Ves. jr. 111.

[2] This bill was therefore not a check at all, but a bill of exchange, for it was a true post-dated check, *i. e.* a check made on its face payable after its date. See Zane on Banks, 349, *n.* 8. There is another use of the words "post-dated check," where the term means a check dated after its delivery. Such a check is not payable until its date, but is not a bill of exchange. See Zane on Banks 260, 261.

[3] Welsh *v.* Gladstone, 1 Phillips C. C. 293.

[4] 2 Ves. jr. 111.

[5] L. R. 6 Eq. 198.

[6] L. R. 6 Eq. 275.

check having been presented when there were sufficient funds, the deposit in the hands of the executor was liable to the payment of the check, and that the effect of the check was to appropriate so much of the "donor's money" as it called for. Again we see appearing the common idea that a depositor has money at his banker's. This case is, of course, not authority.[1]

In the case of Beak *v.* Beak,[2] it was held that no title, legal or equitable, passed to any part of the deposit, where the check was not presented in the donor's lifetime, although the delivery of the check was accompanied by the delivery of the passbook.

The case of *In re* Mead [3] contained the same ruling as the case last cited, the differentiating circumstances being that the donor of the check in his lifetime had given to the bank a notice of withdrawal of the amount stated in the check.

Bouts *v.* Ellis [4] held that, where the donor's check was exchanged for the check of a third party who cashed the donor's check in the lifetime of the donor, although the check taken in exchange by the donee was not cashed until after the death of the donor, title had passed to the money obtained by the donee.

In Burke *v.* Bishop,[5] in an opinion holding that the check of a third party was a good *donatio causa mortis*, there is a *dictum* to this effect:

> "If it had been a check drawn by Hampton Elliott [the donor], and he had died before the check was presented, and the check was a donation, the check would have been worthless, because of the demise of the donor his mandate to his agent, the bank, was revoked."

In all the foregoing cases the recovery was sought against the estate of the drawer. The check in each instance was a gift. The reason given for the decision is that the check as an authority to the banker is withdrawn or destroyed by the drawer's death before acceptance of the check, and hence that no delivery of the money had actually taken place. It has been claimed, however, that the reason given goes far beyond the necessities of the case, for each decision could have been placed on the ground that as between the drawer and the drawee, the lack of a valuable consideration alone was fatal to the passing to the holder of any title, either legal or equitable, in the account with the banker. It may be said that the

---

[1] See 6 HARV. L. REV. 40.
[2] L. R. 13 Eq. 489, usually cited as *In re* Beak.
[3] L. R. 15 Ch. D. 651.
[4] 17 Beav. 121; 4 DeG. M. & G. 249.
[5] 27 La. Ann. 465.

law is that any negotiable instrument of the donor himself,[1] payable to the donee, cannot be the subject of a gift *causa mortis*. So it has been held with regard to a promissory note [2] and a draft.[3] If this be so, it may be said that the foregoing cases do not go to the extent of showing that by the death of the drawer before acceptance the check is revoked.

We may say, on the other hand, that if the check was not revoked by the drawer's death, it remained operative as a mandate to the banker, and that, therefore, a delivery by the donor had been made by the doing of everything that could be done to make the gift complete. If this be so, it would seem that the cases really turn upon the fact as to whether a revocation by death took place.

We come now to the cases wherein a recovery upon a check unaccepted before the drawer's death was sought against the bank. Each one of these cases could have been put upon the sole ground that the holder of an unaccepted check has no right of action against the bank. They are noticed here on account of their bearing upon the duty of a banker to refuse payment of an unaccepted check after notice of the drawer's death.

In Tate *v.* Hilbert[4] it was conceded by the counsel who represented the payee of the check that no recovery could be had against the bank, and so far as the English reports show, no such recovery has ever been attempted.

In Second National Bank *v.* Williams[5] the court held that a check delivered by the intestate while *in extremis* to a certain person to defray the funeral expenses of the intestate, was de-

[1] It is settled that the check or note or other negotiable instrument of a person other than the donor is the subject of gift *causa mortis*. *In re* Mead, L. R. 15 Ch. D. 651; Clement *v.* Cheeseman, L. R. 25 Ch. D. 631; Witt *v.* Amis, 1 B. & S. 109; Amis *v.* Witt, 33 Beav. 619; Hewitt *v.* Kaye, L. R. 6 Eq. 198; Burke *v.* Bishop, 27 La. Ann. 465. The case of Miller *v.* Miller, 3 P. Wms. 356, is *contra* if the note in that case was signed by the donor himself, which seems to be very doubtful. But *quære*, if the note were the joint and several note of the donor and another?

[2] Parish *v.* Stone, 14 Pick. 198; Raymond *v.* Sellick, 10 Conn. 480, but Wright *v.* Wright, 1 Cow. 598, is *contra*. But that case is overruled in Harris *v.* Clark, 3 Comst. 93, and is disapproved in the two cases *ante* in this note. Rolls *v.* Pearce, L. R. 5 Ch. D. 730, is also *contra*. In this case the check had been negotiated to a *bona fide* holder. In Harris *v.* Clark, 3 Comst. 93, the draft had been endorsed, but probably not to a *bona fide* holder.

[3] Harris *v.* Clark, 3 Comst. 93.

[4] 2 Ves. jr. 111.

[5] 13 Mich. 282. This case is directly contrary to the old case of Lawson *v.* Lawson, 1 P. Wms. 441.

stroyed by the death of the drawer before acceptance. The reason given for the decision is that the unaccepted check was revoked by the testator's death.

The case of Fordred *v.* Seamen's Savings Bank[1] was not a case of *donatio causa mortis*, but of a check given without consideration from the payee. The check was held to have been revoked by the donor's death before acceptance.

In Simmons *v.* Cincinnati Savings Society[2] a check of the donor was claimed to be a *donatio causa mortis*, but was held to have been revoked by the donor's death.

In each of the three foregoing cases emphasis was laid upon the fact that the checks given were wholly without consideration and that the payees had no "interest."

In Saylor *v.* Bushong[3] it is said by way of *dictum:* "A check may be revoked before presentment by the drawer's death." It is apparent that the court means not presentment alone, but presentment with acceptance or payment.

In National Commercial Bank *v.* Miller[4] the court, in stating the reasons why an ordinary check does not act as an assignment, legal or equitable, of the deposit, or of any part of it, says that the recourse of the holder is against the drawer and the indorser, if any; that the drawer may revoke the check and countermand its payment before acceptance, and that if the check is unaccepted his death operates as a revocation.

In Brennan *v.* Merchants' National Bank[5] there is a *dictum* to the effect that a check unaccepted is revoked by the drawer's death. Drum *v.* Benton[6] contains a *dictum* to the effect that the death of the drawer acts as a revocation of the authority of the bank or banker to pay, but expresses some doubt of this rule on the later authorities. The court does not indicate where it finds such later authorities.

Pullen *v.* Placer County Bank[7] was a decision by the California Supreme Court in banc overruling a decision of the Department.[8] It holds that a check drawn and delivered by the drawer as a gift with a request that the check be not presented until after the drawer's death was revoked by the drawer's death before accept-

[1] 10 Abb. Pr. N. S. 425 (Court of Appeals).
[2] 31 Oh. St. 457.
[3] 100 Pa. St. 23.
[4] 77 Ala. 168.
[5] 62 Mich. 343.
[6] 13 App. Cas. D. C. 245.
[7] 71 Pac. Rep. 83.
[8] Pullen *v.* Placer County Bank, 66 Pac. Rep. 740.

ance or payment. The decision was placed upon the ground that the check was not an assignment, but was a mere revocable authority to the banker.

It will be seen that no case is yet presented where a check was given upon a consideration, but in Wieand's Adm'r *v.* State National Bank[1] such a case appears. W. drew a check on August 15, 1900, but dated the check August 20, 1900. The drawer died on August 19, 1900. The check was given to the payee for a debt owing to the payee. The check was presented on August 21, 1900, and payment was refused, because, as was the fact, the deposit of the drawer was not equal to the amount of the check, but later the bank with notice of the drawer's death paid the deposit to the holder of the check.

The check being dated August 20th did not become payable until that day, and the bank had no authority to pay until that day.[2] But before the check became even an authority to pay the drawer was dead. The decision might have been put upon that ground, but the point was not noticed. Again, the deposit not being equal to the check, the bank could legally refuse payment of any part of the check,[3] yet if it so pleased it could have paid the deposit on the check,[4] if the check had not been revoked by the drawer's death before it became operative as a check or before it had been accepted.

The court held that the check being a mere authority was revoked by the drawer's death, and gave the administrator of the drawer judgment for the amount of the deposit.

The foregoing cases are all cases where the payee of the check was the party seeking to recover from the bank. There is no case where the check had been negotiated to a *bona fide* holder, but in Rolls *v.* Pearce[5] a recovery was permitted in favor of a *bona fide* transferee, as against the executors of the drawer. But the latter decision cannot be considered an authority upon checks,

---

[1] 65 S. W. Rep. 617. It is singular that a state which holds the assignment theory of a check should be the first to decide the point ruled.

[2] Gordon *v.* Commonwealth Bank, 6 Duer 76; Crawford *v.* West Side Bank, 100 N. Y. 50. Compare Taylor *v.* Sip., 30 N. J. Law 284. This was not a true post-dated check. See *n.* 2, p. 108, *ante*.

[3] In Matter of Brown, 2 Story 519; Dana *v.* Third National Bank, 95 Mass. 445; Coates *v.* Preston, 105 Ill. 470; Lowenstein *v.* Bressler, 109 Ala. 326; Eichelberger *v.* Finley, 7 Har. & J. 381; *contra*, Bromley *v.* Commercial National Bank, 9 Phila. 522.

[4] Dana *v.* Third National Bank, 95 Mass. 445.

[5] L. R. 5 Ch. D. 730.

for the Vice-Chancellor showed that he had no comprehension of former controlling decisions.[1]

There is a decision of an intermediate court in Missouri[2] which holds that the drawer's death does not revoke the check, but that case is no longer an authority.

It is apparent that the understanding among bankers and lawyers is, except possibly in three jurisdictions,[3] that an unaccepted check is revoked by the drawer's death. It will appear, in replying to the objections which have been made to this theory, that this conclusion of the courts results from a perfectly valid rule of law.

The objections which have been made to this theory will now be noticed.

The first objection is that the check is not an authority at all, but an order upon the banker to pay money, and that the banker cannot be considered the agent of the drawer. If the check be an order, it is said that the banker cannot be considered the depositor's agent. But the theory of the rule is not one of agency. The check is called a mandate to the banker. But upon analysis it amounts to an offer on the depositor's part to the banker that if the check is paid by the banker, the amount of it may be subtracted from the depositor's account. This offer to become effective as a contract must be accepted by the banker during the depositor's lifetime. While no court has indicated that the above is the basis of the rule, it seems reasonably plain that there can be no other basis.

The second objection to holding an unaccepted check revoked by the death of the drawer, is the claim that the check is a power or authority coupled with an interest, and therefore not revoked. This theory was suggested by Mr. Vernon in the argument of Lawson *v.* Lawson[4] almost two hundred years ago. It was dismissed in that case by Sir Joseph Jekyll as unworthy of discussion. It reappeared in the hands of a text-writer not many years ago as a new theory.[5] It is not, however, enough to say that the check should be considered as an agreement to pay out of a particular debt or fund either then owing or to become owing, for even in

---

[1] See 6 HARV. L. REV. 40, where this point is elaborated.

[2] See Lewis *v.* International Bank, 13 Mo. App. 202, where it is noticed above.

[3] Illinois, South Carolina, Nebraska, but as appears heretofore Kentucky has receded from its assignment theory on this question.

[4] 1 P. Wms. 441.

[5] See Daniel in 3 Va. Law Jour. 323; 2 Daniel, Neg. Inst. § 1617 b.

that case it is not an assignment.[1] The basis of this theory of a check must be either that the check is a partial assignment of the depositor's chose in action against the banker, or that it is a partial assignment of a fund. The theory is untenable because it assumes that the giving of the check confers upon the payee an interest in the fund or that it confers upon the payee a part of the chose in action. In either case the check being an assignment ceases to be negotiable. For it is one of the fundamental rules of the law of negotiable paper, that the bill or note must be payable generally, and not out of a particular fund. This is, no doubt, the reason why the assignment theory of a check is almost universally rejected by the courts. Outside of the assignment theory there is no ground for calling the check an authority coupled with an interest. For even if it be conceded that the check confers an agency on the payee, the objections to which assumption are apparent,[2] the agency that amounts to an authority with an interest is one that is united with an interest in the subject upon which the power is to be exercised. It is not enough that an interest exists in what is produced by the power.[3] But aside from that, it being conceded that the check is not an assignment and that thereby the payee acquires no interest, it follows that the check cannot be considered as an agency or authority coupled with an interest.

Next it is said that while it may be conceded that a check given without consideration is revoked by the drawer's death before its acceptance, nevertheless if the check was given for a debt or obligation owing from the drawer to the payee it ought not to be considered as revoked. There is in the authorities much by way of *dictum* that may be claimed in support of this contention.

Although counsel for plaintiff in Tate *v.* Hilbert[4] conceded that if the check had been given for a debt it would have conferred no right against the bank, yet in Second National Bank *v.* Williams[5] much stress is laid upon the fact that the payee had no interest.

In Fordred *v.* Seamen's Savings Bank[6] Rapallo, J., observes: "Viewing the draft as a mere direction or power, the plaintiff not

---

[1] Christmas *v.* Russell, 14 Wall. 69.

[2] See 14 HARV. L. REV. 591. Rapallo, J., in Fordred *v.* Seamen's Savings Bank, 10 Abb. Pr. N. S. 425, says: "The plaintiff [the payee] was merely his [the drawer's] agent." But the opinion does not show the sense in which these words are used.

[3] Hunt *v.* Rousmanier, 8 Wheat. 174; Langdon *v.* Langdon, 4 Gray 186.

[4] 2 Ves. jr. 111.

[5] 13 Mich. 282.

[6] 10 Abb. Pr. N. S. 425 (Court of Appeals).

having proved any interest, it was revocable, and was revoked by the death of the drawer." The word "interest" seems to be used in place of the word "consideration."

It is apparent that under other New York decisions the check could confer no interest on the payee.

In Simmons *v.* Cincinnati Savings Bank[1] it is said: "The check in the present instance was a mere order or authority to the payee to draw the money; and it being without consideration, it was subject to be countermanded or revoked, while it remained unacted on in the hands of the payee."

The case of Weiand's Adm'r *v.* State National Bank,[2] however, holds that a check given in payment of a debt was revoked by the death of the drawer before acceptance.

The sufficient answer to this objection is that it imposes upon the banker the duty of determining at his peril whether the drawer gave the check with or without consideration. This fact the banker cannot know, yet he must decide it at his peril. Such a duty imposed upon the banker contradicts the received theory of the banker's contract with the drawer, which is to pay his checks upon demand. No court ever will or can accept such a theory as this, if it has the least comprehension of the business of banking.[3]

Again it is said that in the hands of a *bona fide* holder, an unaccepted check ought not to be considered as revoked by the death of the drawer. There is some authority for this position. In Tate *v.* Hilbert[4] Lord Loughborough said that if the payee had paid the check away either for a valuable consideration or in discharging a debt of her own, it would have been good. But he probably meant that it would have been good against the drawer's estate, which no one would dispute.

In Rolls *v.* Pearce,[5] Malins, V. C., held that the checks having been paid away by the payee were good. It is doubtful whether he intended to go further than to hold them good as against the drawer's estate, but certainly in the light of other English decisions, he could not have intended to intimate that the holder could

---

[1] 31 Oh. St. 457.

[2] 65 S. W. Rep. 617 (Ky.).

[3] In Illinois it has been held that the bank as against a payee who has received a check for the amount of his debt, cannot apply the deposit to a demand note of the drawer which the bank held. Niblack *v.* Park National Bank, 169 Ill. 517. The opinion calls the payee of a check a *bona fide* holder for value.

[4] 2 Ves. jr. 111.

[5] L. R. 5 Ch. D. 730.

recover against the bank. In Illinois, indeed, it has been held that as against a *bona fide* holder of a check, the check cannot be revoked.[1] But this is held upon the wholly untenable doctrine that the check is an assignment.

The objection to this theory is that the banker simply contracts to pay the drawer's checks upon genuine indorsements. He does not contract to go further and to determine at his peril whether or not the indorsee or holder is a *bona fide* holder. Such a requirement would entirely revolutionize the accepted theory of a banker's duty.

Finally, it is said that the mandate of a bill of exchange is not revoked by the drawer's death and that a check should be treated in the same way. But there is no authority for so saying. The usual authorities cited do not establish the proposition as to bills of exchange. The case of Billings *v.* DeVaux[2] merely holds that as against the acceptor, who accepts in ignorance of the death of the drawer, the acceptance is good. This would be the rule as against a bank which accepted a check in ignorance of the death of the drawer, the authorities, as will later appear, saying that a check so accepted and paid may be charged against the drawer's estate. In the case of Hammonds *v.* Barclay[3] the acceptances were made in the lifetime of the drawer. In Cutts *v.* Perkins[4] the draft was held to be an assignment; hence it could not be a bill of exchange, the essence of which is that it must be drawn generally, and is not an assignment. The words of Lord Romilly in Hewitt *v.* Kaye,[5] to the effect that an order for the payment of money, whether the money be at a banker's or anywhere else, is worth nothing if not acted on in the lifetime of the person who gives it, would seem to include bills of exchange. The text-books do not state the rule to be at all settled.

But even though there be no authority for saying that the bill of exchange as a mandate[6] to the drawee is not revoked by the death of the drawer, and even if we assume that such mandate is not revoked by the death of the drawer before acceptance, there

---

[1] Gage Hotel Co. *v.* Union National Bank, 171 Ill. 531.

[2] 3 M. & G. 565.

[3] 2 East 227.

[4] 12 Mass. 206. The so-called bill of exchange in Debesse *v.* Napier, 1 McCord 106, was held to be an assignment for a valuable consideration.

[5] L. R. 6 Eq. 198.

[6] Charles O'Conor, counsel in Harris *v.* Clark, 3 Comst. 93, said: "A draft is not an assignment *per se*, but only a mandate."

are reasons why a bill of exchange should receive a different treatment from that accorded to a check. A bill of exchange is expected to be put into circulation; a check is not. The acceptance of a bill of exchange is not governed by any such customary contract as that which exists between the depositor and his bank. Bills of exchange are usually drawn at a distance from the home of the drawee, and the application of the rule to bills of exchange would cause practical difficulties which would not be met in the case of checks. So that the deduction sought to be made from bills of exchange fails, when the matter is considered in the light both of authority and of actual differences.

There remains to be considered the situation of the bank if it accepts or pays a check after the drawer is dead. If it accepts or pays the check in ignorance of the death of the drawer, the check may be charged against the account. The ground for this rule is apparently a *dictum* of Lord Loughborough. He said in Tate *v.* Hilbert:[1] "If she [the payee] had received it immediately after the death of the testator before the banker was apprised of the death, no court, I am inclined to think, would have taken it away from her."

This has been construed by all the text-writers to mean that the bank would have been protected if it paid the check in ignorance of the drawer's death. In Brennan *v.* Merchants' National Bank[2] there is a *dictum* to this effect. And there are other *dicta* which affirm the rule.[3]

But it is said that if the bank can pay the check if it be ignorant of the death of the drawer, the rule is illogical if the death revokes the authority given by the check. The answer to that suggestion is that the rule of the common law is not undeviating, and the application of the more intelligent principle of the civil law is warranted in this instance by considerations of business policy, which after all have made the law applicable to all kinds of commercial paper. It is warranted also by the analogies of the law applicable to bankers.[4]

If, however, a banker with knowledge of the drawer's death

---

[1] 2 Ves. jr. 111.

[2] 62 Mich. 343.

[3] Drum *v.* Benton, 13 App. Cas. D. C. 245.

[4] It is held that a banker who has no notice of his depositor's death is entitled, when the depositor's bill, which the banker has discounted, becomes due, to charge the bill against the depositor's account. Rogerson *v.* Ladbroke, 1 Bing. 93.

pays the check, the latest authorities are to the effect that the check cannot be charged against the deposit. It is so held in Pullen *v.* Placer County Bank,[1] where the check was delivered as a gift, and in Wieand's Adm'r *v.* State National Bank,[2] where the check was given to pay an existing debt.

It remains to be added that if a check is accepted in the lifetime of the drawer, his death before payment is immaterial.[3] If the acceptance is granted to the drawer of the check before delivery, while the drawer is not released, the bank upon acceptance appropriates so much of the drawer's account as the check calls for. If the acceptance is made to the payee or other holder of the check, the drawer is released and the check becomes the promissory note of the bank, which the holder, with the opportunity of having the check paid, voluntarily received instead of the cash.

There is nothing inequitable in the rule that the death of the drawer revokes an unaccepted check. The check is payment only if it be paid. If the dishonored check is in the hands of the payee who received the check upon a consideration, the payee can recover his claim from the estate if it is solvent. If the check was given without consideration, the law can give the payee no relief. If the check is in the hands of a *bona fide* transferee, he has recourse upon his indorser as well as upon the drawer's estate if the check is dishonored. But there is no reason why, in case the drawer died insolvent, a creditor should obtain a preference merely because he happens to have a check and the insolvent debtor left a balance at his banker's. All the creditors should be placed upon an equality, for " equality is equity."

John Maxcy Zane.

CHICAGO, ILLINOIS.

---

[1] 71 Pac. Rep. 83.

[2] 65 S. W. Rep. 617.

[3] An accepted check cannot be countermanded. See 2 Ames, Cases on Bills 801.